Supreme Court, U.S.
FILED
NOV 14 2016
OFFICE OF THE CLERK

No. 15-649

IN THE

Supreme Court of the United States

CASIMIR CZYZEWSKI, *et al.*,
Petitioners,

v.

JEVIC HOLDING CORP., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Chapter 11 provides only one method of distributing estate assets at the end of a case: through a confirmed plan that respects priority. If a plan cannot be confirmed, the Bankruptcy Code provides just two options: conversion to Chapter 7, in which case estate assets are distributed in accordance with priority, or dismissal, in which case the parties are restored to their prebankruptcy positions. Those specific and carefully circumscribed options for distributing estate assets foreclose what happened here—a settlement and structured dismissal that neither respected priority nor restored parties' prebankruptcy rights, but instead dis-

tributed the estate's assets while deliberately skipping over petitioners' priority claims.

Respondents have little to say in answer. Instead, they argue (for the first time) that petitioners have not been harmed and thus lack standing to be heard, and that petitioners have changed the substance of the question presented. Those arguments are without merit.

By their own admission, respondents orchestrated the settlement and structured dismissal here precisely in order to harm petitioners. After being fired with no warning, petitioners concededly had valid priority claims for state WARN Act damages. The dismissal order here unlawfully distributed the estate's assets to junior creditors in order to prevent petitioners from recovering from the estate, and simultaneously barred petitioners from pursuing the fraudulent-transfer claim against respondents that could have provided an alternative route to recovery, had the bankruptcy court converted the case to Chapter 7 or simply dismissed it. Respondents' speculation that such a fraudulent-transfer action would be unlikely to succeed is irrelevant. The deprivation of a cause of action—*i.e.*, the deprivation of property—is a tangible injury sufficient for Article III purposes regardless of speculation that the property may have little value.

Respondents' contention that petitioners have changed the substance of the question presented is equally meritless. Petitioners' opening brief (at 8 n.2) made clear that they are *not* asking this Court to rule on the validity of "structured dismissals" in general. The issue before this Court is simply whether the priority-violating distribution of settlement proceeds in this case—effectuated through a structured dismissal—is

permitted by the Bankruptcy Code. That is exactly the question on which this Court granted certiorari.

When respondents do reach the actual question presented, they have nothing persuasive to say. Respondents do not even attempt to identify any provision of the Bankruptcy Code that explicitly or implicitly authorizes the priority-violating distribution here. Indeed, respondents expressly repudiate the very provisions they and the bankruptcy court relied on below, thus conceding that no statutory authority for such a priority-violating distribution exists.

Instead, respondents take the unprecedented position that no statutory authority is necessary—and that the Bankruptcy Code does not even *permit* a bankruptcy court to review or disapprove such a distribution of estate property. Respondents' position is seemingly that debtors-in-possession may distribute estate property however and to whomever they see fit, without even the check of bankruptcy court review. That proposition would astonish the bankruptcy courts and practitioners who deal with settlement of estate claims every day—and it would seriously undermine the basic purpose of bankruptcy, which is to ensure, through court supervision, that the value of the estate is maximized for the benefit of creditors and distributed fairly and in accordance with priority.

Respondents themselves implicitly recognize that their position cannot really be correct, as they assert that the authority exercised below can and should be limited to "rare" cases. But respondents can coherently assert that priority-violating distributions of settlement proceeds are "disfavored" or "rare" only if they acknowledge that the Code's provisions addressing distribution of estate property presumptively forbid dis-

tributions in violation of priority. It is thus incumbent on respondents to provide a statutory basis for an exception to the priority scheme for "rare" cases. Respondents' failure to offer one—indeed, their failure even to try—requires reversal.

ARGUMENT

I. THE QUESTION WHETHER A STRUCTURED DISMISSAL MAY DISTRIBUTE SETTLEMENT PROCEEDS IN VIOLATION OF PRIORITY IS PROPERLY PRESENTED

A. This Court Has Jurisdiction

1. This case presents a live controversy under Article III because petitioners have suffered an "actual injury" that is "likely to be redressed by a favorable judicial decision." *Lewis* v. *Continental Bank*, 494 U.S. 472, 477 (1990). Respondents' eleventh-hour attempt to shield their actions from review by alleging that this Court lacks jurisdiction—an argument they would presumably have made in their brief in opposition or earlier if it had any merit—fails.

There is nothing abstract, academic, or "contrived" (Resp. Br. 1) about this dispute, which involves real people—truck drivers Jevic fired without warning—and real harm to those people. It is undisputed that petitioners have a valid multi-million-dollar state WARN Act claim against the debtor, and that they have not received a penny in satisfaction of that claim. The settlement and structured dismissal harmed petitioners by depriving them of any ability to recover on that claim. Had the distribution of the settlement proceeds respected priority, petitioners would have received $1.7 million that instead went to creditors with junior claims. Moreover, the settlement released the estate's fraudulent-transfer claims against Sun and CIT, along

with the state-law fraudulent-transfer claims that petitioners or a Chapter 7 trustee could have otherwise pursued. Pet. Br. 14-17.

Depriving a party of money it should lawfully have received and depriving a party of a cause of action it could otherwise have brought—each of which occurred here—are "'concrete and particularized' invasion[s] of [petitioners'] 'legally protected interest[s]'" that satisfy Article III's injury requirement. *Sprint Commc'ns* v. *APCC Servs.*, 554 U.S. 269, 273 (2008); *see also, e.g.*, *Virginia* v. *Hicks*, 539 U.S. 113, 120-121 (2003) (order "'altering tangible legal rights'" is "actual injury in fact"); *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975) (invasion of legal rights created by statute gives rise to Article III standing).

Reversal of the bankruptcy court's order approving the settlement and structured dismissal would redress that injury. On remand, the bankruptcy court would have several options.

First, the bankruptcy court could order the parties to try to settle the fraudulent-transfer litigation without dictating distribution of the settlement proceeds in violation of priority. Such a settlement is at least possible. Although—as respondents emphasize—Sun previously claimed that it would not settle if any settlement proceeds went to petitioners, and the bankruptcy court credited that testimony (Pet. App. 58a), the situation would have changed on remand. This Court would have made clear that Sun could not require that the settlement proceeds be distributed in violation of priority. Sun would thus have to determine how much the priority-violating provision was worth to it—a decision it has not yet had to make. Moreover, the reason Sun gave for requiring the priority-violating provision was

that it did not want to finance petitioners' WARN Act litigation against it. JA238. That litigation has now been resolved in Sun's favor, *In re Jevic Holding*, 2016 WL 4011149 (3d Cir. July 27, 2016), removing that concern. Especially in light of these changed circumstances, respondents should not be able to shield their own unlawful actions from review based on self-serving assertions that they would never settle if required to comply with the law.

Second, absent a settlement, the court could convert the case to Chapter 7—the typical fate of Chapter 11 cases in which a plan cannot be confirmed. In that event, the Chapter 7 trustee could pursue the fraudulent-transfer claim. Any recovery would become property of the estate, distributed in accordance with priority. Petitioners could thus obtain payment on their priority claims.

Respondents argue (at 19-21) that the bankruptcy court "found" that petitioners would recover nothing in Chapter 7. But the court made no such "finding." Nor could it have. Certainly, the court never suggested that petitioners lacked *standing* to challenge the settlement and structured dismissal. Rather, viewing its task as determining whether the settlement before it was the least bad option for creditors overall, the bankruptcy court "predict[ed]" that petitioners would be unlikely to recover in Chapter 7. Pet. App. 58a. But that was simply a prediction that could prove wrong—not a "finding" set in stone. Indeed, the court expressly noted that a Chapter 7 trustee could retain counsel to litigate the fraudulent-transfer claim on a contingency basis, and while expressing skepticism, "acknowledge[d] that this is a possibility." *Id.* 61a. Nor is that possibility terribly remote, given that the suit had survived a

motion to dismiss, and respondents had agreed to pay $3.7 million to settle it.

In any event, even if the bankruptcy court's predictions proved true and a Chapter 7 trustee was unable to litigate or settle the fraudulent-transfer claim, petitioners would still be better off in Chapter 7 than under the structured dismissal. Under nonbankruptcy law, creditors may sue directly to recover a fraudulent transfer. During the bankruptcy, the trustee has the sole right to pursue or settle such a claim. Pet. Br. 12-17. It is settled law, however, that if the trustee does not resolve a fraudulent-transfer claim, after bankruptcy the right to pursue that claim is revested in the individual creditors. *E.g.*, *Hatchett* v. *United States*, 330 F.3d 875, 885-886 (6th Cir. 2003); *Kathy B. Enters.* v. *United States*, 779 F.2d 1413, 1414-1415 (9th Cir. 1986) (per curiam); *FDIC* v. *Davis*, 733 F.2d 1083, 1084-1085 (4th Cir. 1984). Thus, even if petitioners recovered nothing in the bankruptcy itself, they would retain the right to pursue their state-law fraudulent-transfer claim against respondents after bankruptcy.

Third, the bankruptcy case could simply be dismissed. Dismissal would likewise revest in petitioners their state-law fraudulent-transfer claim against respondents. Pet. Br. 28-29. Respondents argue (at 20-21, 24-25) that petitioners never sought this relief below. But petitioners had no occasion to do so. The only question below was whether to approve the settlement and structured dismissal, and the relief petitioners sought was the denial of that motion. Pet. App. 53a. Only if the bankruptcy court had declined to approve the settlement would the question of next steps—including conversion or dismissal—have arisen. That is a question properly addressed on remand.

Respondents speculate that, for various reasons, it is unlikely that any of these routes would ever result in petitioners' recovering any money. But that is not the test of a live case or controversy. Petitioners were harmed by being deprived of their opportunity, through the fraudulent-transfer action, to recover on their state WARN Act claims. Reversal would restore that opportunity and thus redress the injury suffered. It is not necessary to show that petitioners would succeed in the litigation, or would in fact recover on their claims, to demonstrate standing. *See, e.g.*, *Utah* v. *Evans*, 536 U.S. 452, 464 (2002) (standing existed where "change in a legal status" would increase likelihood of obtaining relief); *Village of Arlington Heights* v. *Metropolitan Hous. Dev.*, 429 U.S. 252, 261-263 (1977) (litigant had standing where ruling would afford it opportunity to undertake building project even though uncertainties surrounding financing and construction remained); *In re DBSD N. Am.*, 634 F.3d 79, 93 (2d Cir. 2011) (creditor had standing to pursue appeal of Chapter 11 plan even if creditor might fare no better under an alternative plan and had a "claim that might turn out to be valueless"). Simply put, Article III does not prevent this Court from reversing the bankruptcy court's judgment and restoring petitioners' cause of action simply because of the bankruptcy court's untested prediction that petitioners would likely not obtain recovery through that action.

2. Respondents' separate suggestion (at 45 n.3) that this appeal is "equitably moot" does not implicate Article III concerns. Equitable mootness is not constitutional mootness, but a judge-made prudential doctrine under which courts of appeals abstain from hearing certain appeals over which they have jurisdiction when they deem it "inequitable" to unwind the transac-

tion being appealed. *E.g.*, *In re Philadelphia Newspapers*, 690 F.3d 161, 168 (3d Cir. 2012); *In re Continental Airlines*, 91 F.3d 553, 567 (3d Cir. 1996) (en banc) (Alito J., dissenting) (equitable mootness "refuse[s] to entertain the merits of live bankruptcy appeals over which [courts] indisputably possess statutory jurisdiction"). In any event, under Third Circuit law, the doctrine applies only to an appeal from a confirmed plan, not orders like this one. Pet. App. 24a.

It is of no moment that unsecured creditors junior to petitioners have already been paid on their claims. That was respondents' decision, and it is respondents' problem. Respondents could have conditioned consummation of the settlement on the order approving it becoming final and non-appealable—a routine practice in bankruptcy court. By choosing not to do so, they assumed the risk that the bankruptcy court's order would be reversed and the settlement set aside. Whether, if that occurs, respondents can recover the settlement proceeds they chose to pay out from the creditors who received them is a matter between respondents and those creditors. It has no effect on the relief petitioners can obtain on remand.

B. The Question Is Properly Presented

Respondents' contention that petitioners have changed the substance of the question presented is puzzling. This Court's rules expressly allow petitioners to change the wording of the question presented, R. 24.1(a), and petitioners did so only for the sake of concision and clarity. The question presented in the petition included a paragraph of background explaining that the case involved a structured dismissal, and then asked "[w]hether a bankruptcy court may authorize the distribution of settlement proceeds in a manner that vio-

lates the statutory priority scheme." The question presented in the brief was shorter and simpler: "Whether a Chapter 11 case may be terminated by a 'structured dismissal' that distributes estate property in violation of the Bankruptcy Code's priority scheme." The difference in wording reflects no difference in substance. The "authoriz[ation]" to violate priority was embodied here in a structured dismissal, and "settlement proceeds" are "estate property."

Respondents claim that petitioners have sandbagged the Court in order to raise a challenge to the validity of structured dismissals. That is false. As petitioners clearly explained (at 8 n.2), this case does not present the question whether structured dismissals are ever permissible. The narrow question here is only whether the Bankruptcy Code authorizes a nonconsensual structured dismissal *that includes a priority-violating distribution of settlement proceeds*. That is the question presented and addressed in both the petition and the brief.

II. STRUCTURED DISMISSALS MUST RESPECT THE BANKRUPTCY CODE'S PRIORITY SCHEME

Respondents' arguments on the merits are equally surprising. Below, and in their brief in opposition to certiorari (at 18 n.3), respondents claimed that the bankruptcy court drew its authority to approve the settlement and structured dismissal in this case from Federal Rule of Bankruptcy Procedure 9019. Petitioners pointed out in their opening brief (at 30-32) that Rule 9019, as a rule of procedure, cannot provide the substantive authority for a priority-skipping distribution; only the Bankruptcy Code could provide such authority, and as petitioners demonstrated, it does not. Respondents have now abandoned any attempt to identify

a provision of the Bankruptcy Code or Rules that explicitly or implicitly authorizes the priority-violating distribution here. They have thus conceded that there is no such provision. Because, as respondents themselves elsewhere acknowledge (at 42), it is fundamental that bankruptcy courts may exercise only the powers granted to them by Congress in the Bankruptcy Code, that concession is all the Court needs to decide this case.

The arguments respondents do make cannot fill the void. Respondents first advance the bizarre contention that bankruptcy courts may not review and approve or disapprove settlements at all. Besides being false, that does not help respondents, because what is at issue here is not the settlement itself, but the distribution of the settlement proceeds—and the Bankruptcy Code clearly specifies how all estate property must be distributed. Next, respondents argue that the priority scheme does not apply to "settlements"—but, again, they ignore that settlement proceeds are estate assets whose distribution is governed by specific provisions of the Code. Finally, respondents assert that settlements can violate priority only in "rare" circumstances. But that acknowledgment that the distribution of settlement proceeds is presumptively subject to the priority scheme refutes their earlier arguments and simply highlights the lack of any statutory basis for the priority violation here.

A. Debtors May Not Settle Estate Claims And Distribute The Proceeds Without Court Approval Or Statutory Authorization

1. Rather than explaining how the Bankruptcy Code authorizes the distribution here, respondents advance the outlandish contention that debtors-in-

possession are free to settle claims belonging to the estate and then distribute the settlement proceeds however and to whomever they wish, without any statutory authority or bankruptcy court oversight. Repudiating their previous claim that Rule 9019 governs here, respondents argue that bankruptcy courts have no authority to review and approve settlements in the first place, and thus no power to disapprove settlements that violate priority.

Respondents are wrong. Section 363 requires court approval for any use or sale of estate property outside the ordinary course of business. §363(b)(1). A cause of action belonging to the estate is property of the estate. §§541(a)(1), (3), 544, 548, 550; *In re Moore*, 608 F.3d 253, 259-262 (5th Cir. 2010) ("'It is well established that a claim for fraudulent conveyance is included within ... [estate] property.'"); *Northview Motors* v. *Chrysler Motors*, 186 F.3d 346, 350 (3d Cir. 1999) (estate "includes ... *causes of action*" (quoting H.R. No. Rep. No. 95-595, at 367 (1977))). The settlement of an estate claim therefore requires court approval.

Respondents contend that a settlement is not a "sale," but as the majority of courts have held, in functional terms, it is. Settling an estate claim is economically the same as selling the claim to a third party—both dispose of an estate asset for cash—and is in substance simply a sale of the claim to the defendant itself (who is paying for control over the decision to dismiss it). Pet. Br. 33 (citing cases); *In re Mickey Thompson Entm't Group*, 292 B.R. 415, 421 (B.A.P. 9th Cir. 2003); *In re Dow Corning*, 198 B.R. 214, 245-247 (Bankr. E.D. Mich. 1996); *In re Telesphere Commc'ns*, 179 B.R. 544, 552 & n.7 (Bankr. N.D. Ill. 1994). The sole authority respondents cite (at 29)—*In re Healthco Int'l*—*agreed* that court approval is required to settle an estate claim,

and questioned only whether that requirement derives from §363, §105(a), or the court's "inherent" authority, an issue it did not decide. 136 F.3d 45, 50 & n.4 (1st Cir. 1998).

It is not surprising that respondents can muster no authority in support of their position, as it is sharply at odds with long-settled bankruptcy law. Estate causes of action, including fraudulent-transfer claims, are often significant assets of the estate and sometimes—as here—the principal source of creditor recoveries. Section 363(b) requires the debtor-in-possession to obtain court approval before it disposes of significant estate assets in order to ensure that it maximizes the value of those assets for the benefit of creditors. A low-ball settlement that undervalues an estate claim harms creditors in the same way as a low-ball price for any other estate asset. Thus, as courts have overwhelmingly recognized, court approval is required whenever the debtor seeks to dispose of a significant estate asset, including a cause of action. Pet. Br. 31-34; Valencia, *The Sanctity of Settlements and the Significance of Court Approval*, 78 Or. L. Rev. 425, 477-484 (1999) (collecting cases).

Legislative history is no more helpful to respondents. When Congress enacted the 1978 Bankruptcy Code, it did not reenact §27 of the Bankruptcy Act in its previous form—which extended broadly to the "compromise [of] any controversy arising in the administration of the estate"—but it did retain the requirement that courts approve settlements, at least to the extent they dispose of significant estate assets, when it enacted §363. *Dow Corning*, 198 B.R. at 246-247. Respondents cite nothing in the legislative history that discusses the repeal of §27, pointing instead (at 31) to discussion of an entirely separate issue—Congress's

decision to remove judges from the administrative supervision of trustees, which routinely involved *ex parte* communications, compromising the judge's role as impartial arbiter of disputes between the trustee and adverse parties. H.R. Rep. No. 95-595, at 88-91. Nothing in this history suggests that Congress intended to remove bankruptcy courts from their long-standing role in reviewing and adjudicating disputes over the trustee's settlement of estate claims.[1]

2. Respondents' argument fails in any event because, even if debtors-in-possession had the authority to settle estate claims without court approval, they have no authority to distribute the resulting settlement proceeds except as specifically permitted in the Bankruptcy Code. Although respondents conflate the two concepts throughout their brief, the *settlement* of an estate cause of action—that is, the decision to release an estate claim in return for consideration—is distinct from the *distribution* of the settlement proceeds. Because settlement proceeds are property of the estate, their distribution is governed not by whatever authority the debtor-in-possession may have to settle a claim, but by the specific provisions of the Code setting out the manner in which estate assets may be distributed.

The bankruptcy court's exclusive supervision of and control over all estate assets is central to bank-

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[1] Respondents contend (at 32) that §363's precursor, §116(3) of the Bankruptcy Act, could not have authorized courts to approve settlements of estate causes of action because §27 would then have been superfluous. But §116(3) governed only the lease or sale of "real or personal" "property of the debtor." Congress expanded §363 to cover the use, sale, or lease of any "property of the estate," which includes causes of action.

ruptcy law. "Bankruptcy jurisdiction, at its core, is *in rem*," and "'[t]he whole [bankruptcy] process of proof [and] allowance [of creditors' claims], and distribution is, shortly speaking, an adjudication of interests claimed in a *res*.'" *Central Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 362 (2006). Thus, "[c]ritical features of every bankruptcy proceeding are the exercise of exclusive jurisdiction over all of the debtor's property, [and] the equitable distribution of that property among the debtor's creditors." *Id.* at 363-364.

Accordingly, when a corporate debtor files for bankruptcy, it loses the freedom to dispose of its property as it sees fit. All its property is transferred to the bankruptcy estate and is subject to the exclusive jurisdiction of the bankruptcy court. §541(a), (c); 28 U.S.C. §1334(e)(1); H.R. Rep. No. 95-595, at 368 ("Once the estate is created, no interests in property of the estate remain in the debtor.... The bankruptcy proceeding will continue in rem with respect to property of the [e]state[.]"). In essence, the estate is a trust for the benefit of creditors. And while a Chapter 11 debtor usually remains in possession of estate assets, it assumes the role and duties of a bankruptcy trustee and must manage the estate for the benefit of creditors. §§1106, 1107(a); *see also* H.R. Rep. No. 95-595, at 91 (long-standing "premise" underlying bankruptcy law is "that the money of the estate [i]s essentially a trust for the benefit of the bankrupt's creditors").

The Code strictly controls distribution of the estate. The bankruptcy filing triggers an "automatic stay" of any act to seize estate property, §362(a); a debtor-in-possession cannot abandon valueless estate property without court approval, §554; it cannot use, sell, or lease estate property outside the ordinary course of business without court approval, §363(b)(1),

(c)(1); and it cannot distribute estate value to creditors in satisfaction of their prepetition claims except under a Chapter 11 plan, subject to a few minor and carefully specified exceptions, *e.g.*, §365(b) (debtor must cure prepetition default to assume executory contract). Furthermore, any postpetition transfer of estate property is avoidable unless the transfer "is authorized" by a provision of the Code or an order of the court. §§549(a), 550.

The Code imposes these strict limits to ensure that bankruptcy law achieves its central purpose: to allocate estate property among creditors fairly and equitably and in accordance with priority. Respondents are thus simply wrong to contend that because the distribution of estate assets here was associated with a "settlement," no statutory constraints applied to that distribution. Settlement proceeds are subject to the same strict and reticulated distributional scheme as all other estate assets.

B. The Bankruptcy Code's Intricate Priority Scheme And Limited Options For Exiting Chapter 11 Foreclose a Priority-Skipping Structured Dismissal

Alternatively, respondents argue (at 35-41) that the Bankruptcy Code does not expressly require compliance with the priority scheme when the court approves a settlement of estate claims outside a plan. But as petitioners explained in their opening brief (at 21-44), the text and structure of the Code demonstrate that it prohibits what occurred here.

1. The Code provides only three ways for a Chapter 11 debtor to exit bankruptcy: confirmation of a plan; conversion to Chapter 7; or dismissal. To be confirmed, a plan must comply with Chapter 11's intricate

rules governing distribution of the estate's value to creditors, including the priority scheme. If the debtor cannot confirm a plan, the case may be converted to Chapter 7, where the estate's value must likewise be distributed in accordance with priority. Alternatively, the Chapter 11 case may be dismissed, in which case the estate's assets are not distributed to creditors but returned to their prebankruptcy owners. Those comprehensive and detailed rules governing distribution of the estate preclude any inference that a debtor and junior creditors may create a new exit from Chapter 11 to accomplish precisely what Congress forbade in a plan or Chapter 7 liquidation.

Respondents never actually engage with this point, instead spending many pages (*e.g.*, 36-38, 42-44) responding to arguments petitioners are not making, and caricaturing petitioners' argument (at 39) as one about "penumbras" and "emanati[ons]."

To the contrary, it is a basic principle of construction that a specific, detailed statutory scheme governing a particular matter—here, the distribution of estate assets, including settlement proceeds—carries with it the inference that Congress intended that scheme to be followed absent an express exception. This Court has consistently applied that principle in interpreting the Bankruptcy Code. Pet. Br. 38-44 (citing cases).

Respondents' repeated refrain that the text of §1129(b) applies the priority scheme only to plans and not to "settlements" thus entirely misses the point. Section 1129(b) applies only to plans because, with a few express exceptions (*see* Pet. Br. 25-26), *plans are the only method Chapter 11 provides for distributing estate assets*. Chapter 11 simply does not contemplate that an order approving the settlement of an estate

cause of action will dictate the distribution of the proceeds of the settlement. Rather, a bankruptcy court reviews and approves or disapproves settlements of estate claims based on whether they provide fair value to the estate as a whole. *Moore*, 608 F.3d at 263-266. The settlement proceeds, like all other estate assets, are then distributed through plans and in accordance with priority. Since "settlements" are not an alternative method of distributing estate assets, it would be exceedingly odd if §1129(b) expressly applied to "settlements." What matters is that §1129(b)—like §726 in Chapter 7 cases—expressly applies to the distribution of estate assets and require strict adherence to priority.

The clear inference is that parties cannot create alternative methods of distributing estate assets, not specified in the statute, and use them to evade the Code's specific priority scheme. That is precisely the same sort of statutory construction issue this Court faced in *United Savings Ass'n of Texas* v. *Timbers of Inwood Forest Associates*, holding that an undersecured creditor could not use the Code's adequate protection provisions to claim postpetition interest when the specific provision addressing postpetition interest mentioned only oversecured creditors, 484 U.S. 365, 371-373 (1988); in *RadLAX Gateway Hotel* v. *Amalgamated Bank*, holding that the debtor could not use the "indubitable equivalent" option in the cramdown provisions to hold a sale without credit-bidding when the specific provision referring to sales required credit-bidding, 132 S. Ct. 2065, 2070-2071 (2012); and in *Hartford Underwriters Ins.* v. *Union Planters Bank*, holding that a provision stating that the trustee could take a certain action implicitly barred a creditor from taking the same action, 530 U.S. 1, 6 (2000). Just as in those cases, respondents here are seeking to evade the specif-

ic provisions of the Bankruptcy Code governing distributions of estate assets, which require adherence to priority. But this case is far more egregious because respondents have not even attempted to identify any provision that could authorize an alternative, priority-violating distribution mechanism—indeed, they have conceded that no such provision exists.

2. Respondents' rule is without limits. If the Code's requirement that a plan must respect priority meant that priority applies *only* to a plan, but not to a settlement outside a plan, little would remain of the priority scheme. Indeed, the logic of respondents' argument is not limited to the settlement context; if the priority scheme applies only to a "plan" and nothing else, then parties are free to violate priority in any other context—*e.g.*, a sale of tangible estate assets or of the debtor as a going concern—so long as it is done outside a plan. Even where the parties intend to confirm a plan, nothing would prevent them from arranging for a priority-skipping distribution to junior creditors outside the plan, followed by a plan that distributes the remaining value to the senior creditors, leaving nothing for the skipped intermediate creditors. Respondents' position would thus rip a gaping hole in the fabric of the Bankruptcy Code.

Perhaps appreciating that the logic of their position proves too much, respondents attempt to temper those obviously unacceptable consequences by asserting (at 46-49) that departures from the priority scheme should be, and under the decision below will be, confined to "rare" cases. Of course, bankruptcy courts will have no power to enforce those limits if respondents are correct that the Code does not permit courts to review settlements in the first place. But the more fundamental problem with this argument is that if respondents are

correct in their interpretation of the Code, those judge-made limits have no basis in the statute. If Congress truly determined that the priority scheme should apply only to a plan, and not to distributions outside a plan, then a rule applying the priority scheme to such distributions in all but "rare" cases would violate Congress's command.

The decision below reasoned that such a limit would be necessary to ensure that parties do not circumvent the Code's priority scheme. Pet. App. 14a-15a, 20a-21a. Respondents similarly urge (at 34) that their rule "does not give parties *carte blanche* to use settlements to circumvent the Code's priority scheme." But the recognition that priority-violating distributions outside a plan are problematic highlights the basic flaw in respondents' argument. That even respondents acknowledge such distributions would be contrary to Congress's intent except in rare cases reinforces the conclusion that Congress never intended to permit priority-violating distributions outside a plan in the first place.

C. Respondents' Policy Arguments Are Meritless

Finally, respondents argue that dire policy consequences will follow from requiring settlements and structured dismissals to respect priority. The courts, of course, may not second-guess on policy grounds the choices Congress made in the Bankruptcy Code. In any event, respondents' claims are unfounded.

Respondents contend (at 45-46) that adherence to priority "cannot accommodate the dynamic status of some pre-plan bankruptcy settlements," "when the nature and extent of the estate and the claims against it are not fully resolved." That argument is wholly mis-

placed here. This was not a "pre-plan settlement," and the nature and extent of the estate and the claims against it *had been* fully resolved. Indeed, the settlement and structured dismissal here were devised only after it was clear that no plan was possible, and were designed to evade the options prescribed by the Code in that event: conversion to Chapter 7 or a dismissal that reinstates parties' prebankruptcy rights.

Respondents also wrongly claim (at 51) that a reversal here will "significantly destabilize many 'central features of modern bankruptcy practice.'" Among the practices respondents and their amici claim are threatened are first-day wage orders (in which a bankruptcy court approves payment of prepetition wage claims), *id.* 50, critical-vendor orders (in which the court permits payment of prepetition claims of vendors deemed essential to the debtor's business), Bhandari Br. 22-23, and cross-collateralization or "roll-ups" (in which the bankruptcy court approves terms for debtor-in-possession loans granting the lender the right to be repaid on its own prepetition debt before other prepetition debts are paid), Resp. Br. 51; Bhandari Br. 23-24.

The lower courts disagree whether the Code authorizes critical-vendor and similar orders absent consent. *Compare In re Kmart Corp.*, 359 F.3d 866, 871-874 (7th Cir. 2004) (affirming district court decision finding Code did not authorize critical-vendor orders); *In re B&W Enters.*, 713 F.2d 534, 536-537 (9th Cir. 1983) (Code did not authorize critical-vendor order), *with In re Just For Feet*, 242 B.R. 821, 826 (D. Del. 1999) (critical-vendor order permissible); *compare In re Saybrook Mfg.*, 963 F.2d 1490, 1494-1496 (11th Cir. 1992) (roll-ups *per se* impermissible), *with In re Ames Dep't Stores*, 115 B.R. 34, 39-40 (Bankr. S.D.N.Y. 1990) (permitting roll-up). But the important point for pre-

sent purposes is that this case does not require the Court to address any of these questions.

Respect for priority in this case imperils none of these easily distinguishable practices, which typically require a finding that the distribution is necessary to the debtor's reorganization. *E.g.*, *Just For Feet*, 242 B.R. at 826. A debtor may need debtor-in-possession financing to reorganize successfully; it may also need to pay key workers and vendors to operate its business during bankruptcy and thus emerge as a viable going concern. Moreover, in many cases, these distributions are consensual and thus do not violate the rights of objecting priority creditors. Here, for example, Jevic negotiated a consensual agreement with secured creditors CIT and Sun to pay some of petitioners' prepetition wages—though not their state WARN Act damages. JA226-227. Contrary to respondents' contentions, a reversal here would not imperil such consensual arrangements.

By contrast, the priority-violating distribution here was not consensual. Nor did it serve any reorganizational goal; at that point, everyone agreed that Jevic could not be reorganized, and the structured dismissal was designed to divide up the remaining value in the estate and close the case. This is thus the pure case of a priority violation for its own sake—the admitted goal of the violation was to deprive petitioners of what they were owed, not to bolster Jevic's business.

Respondents complain (at 51) that adherence to priority in cases like this one privileges "single holdout creditor[s]" at the expense of other stakeholders. But Congress made the deliberate choice to entitle priority creditors like petitioners to demand payment in full before lower-priority creditors receive anything. If the

settlement here had been embodied in a plan, the plan could not have been confirmed unless each priority creditor was paid in full or consented to different treatment. §1129(a)(9). (Thus, respondents are wrong (at 52) that "in the plan context, creditors do not enjoy the degree of leverage petitioners seek here." Priority creditors like petitioners do.) Similarly, in Chapter 7, petitioners would have been entitled to payment before general unsecured creditors. Congress's choice must be respected.

Finally, respondents fall back on the contention that the settlement and structured dismissal here should have been approved because it was the least bad outcome. As discussed above, there is substantial reason to doubt that conclusion—there is no way to know what the result would have been if a Chapter 7 trustee or petitioners had been permitted to pursue the fraudulent-transfer claim against respondents. But even if it were true that general unsecured creditors recovered more through the structured dismissal than petitioners would have recovered without it, that is not grounds for flouting the Code's priority scheme. Having conceded that there is no statutory basis for such a departure, respondents cannot rely on their own policy preferences to supplant Congress's judgment.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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NOVEMBER 2016